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September 20, 2004

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
One South Station, 2nd Floor
Boston, MA 02110

Re: D.T.E. 03-60

Dear Secretary Cottrell:

Verizon Massachusetts (“Verizon MA”) files this response to the September 13, 2004, letter of AT&T concerning the development of a summary of the data compiled in this proceeding for filing with the FCC in the *USTA II* remand proceeding. AT&T states that it and several other CLECs have conferred “to assist the Department in its efforts to compile a fair summary of the record in this case that may be used by the FCC to make impairment/non-impairment determinations.” AT&T’s objective is, of course, not to assist the Department as it contends.¹ Rather, under the guise of lending assistance, AT&T is attempting to engage the Department in a partisan effort to create a *new* record supporting the CLECs’ positions that bears the Department’s imprimatur on both their factual and legal claims. The Department should not take the bait.

First, AT&T takes issue with Verizon MA’s position that the Department should not undertake to prepare a summary of the record by asserting that it is a “one-sided, self-serving view” and a “single-minded pursuit of [Verizon’s] own self-interest” based on a “concern[] that the hard facts in the record of this case resulting from the participation of all parties demonstrate impairment.” AT&T Letter at 1. This is nonsense. Tellingly, the only other party to file comments on the subject, MCI, agrees with Verizon MA’s position and “encourages the Department to not attempt to create a summary of the incomplete record in this proceeding.” *See* MCI Letter dated September 13, 2004, at 1. Based on AT&T’s logic, MCI is also being self-serving and desires to avoid creating a summary because the “hard facts” in the record of the case would support Verizon MA’s substantive positions. Obviously, all parties – including AT&T – are advancing positions

¹ Indeed, the FCC placed no obligation whatsoever on any state agency to present any data or summary in the remand proceeding.

that are in their best interests. AT&T's aspersions against Verizon MA are little more than a diversion to mask the obvious fact recognized by both Verizon MA and MCI – the record in this case is incomplete. As Verizon MA explained in its comments, although some parties, including Verizon MA, submitted written, pre-filed initial and rebuttal testimony, no evidentiary hearings were held, no briefs were filed, and no data were admitted into evidence.

Incredibly, while berating Verizon MA here for its recommendation to the Department, AT&T has taken the *exact* same position as Verizon MA in at least one other jurisdiction. In response to an inquiry by the District of Columbia (“DC”) Public Service Commission regarding the summary of the record in its *Triennial Review* proceeding, AT&T states:

AT&T recommends that this Commission not attempt to create a “summary” of the evidence for the FCC. The Commission lacks a complete record to enable it to create such a summary.

Without the benefit of a full evidentiary record in this proceeding – where prefiled testimony has been subjected to cross examination and where parties have had the opportunity to submit briefs and/or otherwise argue the relative merits of the various positions presented – this Commission cannot reasonably be expected to evaluate and summarize the filings in this docket. It is simply not reasonable to expect this Commission to “summarize” an incomplete record. Instead, the Commission should simply permit the parties to summarize their own testimony and filings for submission to the FCC.

See Attachment A, Response of AT&T Communications of Washington, DC LLC and Teleport Communications–Washington, DC Inc. to Commission Order No. 13371, at 1-2.

AT&T's DC comments continue by noting that the task of summarizing the incomplete record “would stretch the Commission's financial resources and burden legal and technical staff members. The Commission should not place itself in such an untenable position.” *Id.*, at 3. Apparently, AT&T is unconcerned about placing this Department in that “untenable position” and wasting its resources.²

² The DC proceeding was suspended by the Commission at a somewhat different stage than the Massachusetts case. In DC, CLEC testimony on all issues had not been filed and discovery was not complete, whereas those events had occurred in D.T.E. 03-60. AT&T did not, however, consider the status of CLEC filings and discovery in DC to be the principle reason why the record was incomplete. AT&T explained it was “more significant” that the DC Commission had not conducted evidentiary hearings, and therefore, testimony was never admitted into the record and subject to cross examination. According to AT&T in DC, “[a]bsent a record where opposing parties were able to test and probe the relative strengths and weakness of each other's pre-filed testimony, the Commission is in no position to weigh the evidence. Any ‘summary’ based on such incomplete information would not be useful to the FCC.” Attachment A, at 2-3. This is the

Second, not only is this case incomplete, but contrary to AT&T's suggestion, it did not even deal with the range of facts that both *USTA I* and *II* concluded the FCC must consider before finding "impairment" under the Section 251(d)(2) of the 1996 Act. Rather, the sole purpose of the proceeding was for the Department to apply the FCC's objective triggers for mass market switching, transport, and high capacity loops – nothing more, nothing less. As the Department knows, *USTA II* found that the FCC could not delegate that determination to the states. Verizon MA is not concerned about prevailing based on a complete record consisting of those facts relevant to the impairment analysis the D.C. Circuit Court of Appeals has ruled the FCC must conduct. That is not, however, this proceeding which was narrow in both purpose and scope.

Third, AT&T's asserts that the effort in which it seeks to engage the Department would consist of "developing a data base of the routes for transport and the building locations for loops as to which Verizon claims non-impairment. With respect to routes, as to each CLEC for each route that Verizon has identified as a trigger candidate, the CLEC would be marked with a code that identifies the reason or reasons that it should not be counted as a trigger candidate on that route or for that building." AT&T Letter at 2. AT&T then suggests various categories within which routes or buildings could fall. AT&T describes an exercise that would not simply consist of a summary of "facts" presented in the case but instead calls for the creation of *new* information and drawing conclusions from that data based on AT&T's interpretation of FCC rules. In short, AT&T asks the Department to do nothing less than hear the CLECs' case "informally" and make findings about application of the FCC's trigger analyses that *USTA II* struck down. AT&T's proposal is unworthy of any consideration.

AT&T's effort to supplement the "facts" in the case and sneak substantive determinations into what it characterizes as a "fair summary of the record" is readily apparent in its discussion of the coding of CLECs having interoffice facilities. AT&T describes the exercise of coding of CLECs, in which it suggests the Department would participate, as follows:

For example, on route "A" identified by Verizon, there may be evidence that CLEC "1" identified by Verizon as a trigger candidate does not qualify because the fiber facilities running along that route are not terminated in the collocation facilities at both ends and are used instead as entrance facilities or extended loops. A code for such reason would be placed on that CLEC for that route.

Similarly, there may be evidence that CLEC "2" on that route (or any other) does not qualify because the CLEC does not have dedicated transport between the two collocation facilities at the

same posture as D.T.E. 03-60 where there is no evidentiary record because the Department suspended the proceeding well before hearings. Here too, AT&T is apparently unconcerned about expending Department resources in an exercise whose product AT&T has admitted elsewhere would not be useful to the FCC.

DS3 (or lower) level, as required by the FCC's rules. AT&T Letter at 2.

AT&T knows, based on the testimony presented by Verizon MA in this case and by Verizon in cases in other states, that its proposed disqualification of the CLEC 1 and CLEC 2 routing configurations is contested by Verizon. Our view is that these CLECs were properly counted in the trigger analysis under the FCC's vacated rules. AT&T's characterization of the routing configurations as "non-qualifying" only reflects its incorrect interpretation of those rules. Thus, AT&T's claim that its objective is to assist the Department in preparing a "fair summary of the record" is disingenuous at best. Contrary to its actions elsewhere, AT&T has crafted this purportedly helpful "summary" process to lure the Department into accepting its interpretation of the FCC's vacated rules. Verizon MA is confident that the Department will recognize AT&T's stratagem for what it is.

Fourth, AT&T rails against Verizon MA's position that there is no need for the Department to create a summary because parties can present whatever information they wish to the FCC. MCI makes a similar point. According to AT&T, this demonstrates that Verizon (and presumably MCI) "prefers to present a one-sided, self-serving view to the FCC." AT&T Letter at 1. The Department should not be concerned. Indeed, AT&T is also not concerned with the approach since it recommended that the DC Commission "find that parties should submit their own summaries of the testimony and other filing directly to the FCC." Attachment A, at 4. AT&T, as well as other CLECs, are no less vigorous in their advocacy before the FCC than Verizon and can present the facts supporting their positions. Verizon MA believes that, like the Department, the FCC is capable of sifting through the parties' data and arguments. There simply is no reason for the Department to place its thumb on the scale by participating in AT&T's proposed scheme.³

Finally, although the Department should not proceed as AT&T suggests, if it decides otherwise, Verizon MA should receive all information and analyses that are provided by CLECs to the Department that could be used by it to prepare a summary for the FCC. This exchange of information was the process used in D.T.E. 99-271 (which AT&T cites as precedent) where all parties had a full and fair opportunity to review and comment on data submissions and arguments raised by the participants. AT&T cannot possibly object to this since it claims that it only wants to ensure a "fair summary of the record" and certainly cannot intend to "to present a one-sided, self-serving view" to the

³ AT&T states that it recognizes that the Department is no longer responsible for making a decision on the issues of impairment under the Telecommunications Act of 1996. This was the clear and unambiguous holding of *USTA II*. AT&T Letter at 3. However, AT&T asserts that many other state commissions have found that they retain the power to order unbundling under the authority of state law and the Bell Atlantic/GTE merger order. AT&T Letter at fn. 2. AT&T is incorrect on two scores – many states have not made those findings, and as Verizon MA established in its comments on the Department's Briefing Questions, neither Massachusetts law nor the Bell Atlantic/GTE merger order give the Department a basis to mandate unbundling.

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Department. Verizon MA's perspective would be essential for the creation of a balanced report that AT&T professes is its sole objective.

Sincerely,

/s/ Bruce P. Beausejour

Bruce P. Beausejour

cc: Paula Foley, Esquire, Hearing Officer
Michael Isenberg, Esquire, Director-Telecommunications Division
April Mulqueen, Esquire, Assistant Director-Telecommunications Division
Attached D.T.E. 03-60 Service List